



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 25, 1994

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Office of the Comptroller of Public Accounts
LBJ State Office Building
111 East 17th Street
Austin, Texas 78774

OR95-213

Dear Ms. Joseph:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28148.

The Comptroller of Public Accounts (the "comptroller") received a request for the names, addresses, and sales tax status of commercial and industrial customers of TU Electric ("TU") within the city of Dallas. The requestor, an attorney who made the request on behalf of his clients, is apparently seeking information from the comptroller under the Open Records Act that he has been unable to obtain directly from TU:

[The requestor's clients] have previously made several written requests upon TU Electric for the disclosure of this information but the utility has refused to make this information available. . . . Even if TU [is] not a governmental entity, it is nonetheless maintaining sales tax records to which the Comptroller, a governmental entity, has a right of access.

The requestor has asked the comptroller to either obtain the requested information from TU or to direct TU to make the information available to the requestor.

Section 552.002 of the Government Code defines a "public record" as that portion of material that contains "public information." Section 552.021(a) provides:

Information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Information that is collected, assembled, or maintained by a governmental body is public information subject to the act. Open Records Decision No. 583 (1990) at 4. There may be situations when information not in the governmental body's physical possession falls within the section 552.021(a) definition, such as when a governmental body has access by contract to records prepared for the governmental body's use:

Prior decisions of this office have recognized that a governmental body may contract with a consultant or independent contractor to prepare information for its use in the conduct of official business. . . . On occasion, the independent contractor has maintained his report and underlying data in his own office, making it available for the governmental body to use without actually having physical custody of the records Where the contractor has prepared information on behalf of a governmental body and makes it available to the governmental body, the information has been held to be subject to the Open Records Act, even though it is not in the governmental body's physical custody.

Open Records Decision No. 558 (1990) at 2 (citations omitted).

However, there is no evidence that such a contractor situation exists between the comptroller and TU. *See also* Open Records Decision No. 518 (1989) at 3. In Open Records Decision No. 534 (1989) at 2, we stated that a governmental body has no duty to obtain information from a third party unless that information is being held in such a contractor type of situation "on behalf of" the governmental body. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 268 (Tex. Civ. App.--San Antonio 1978, writ dismissed w.o.j.) (to require governmental officer to produce information not actually possessed by governmental body would be to require an "impossible act").

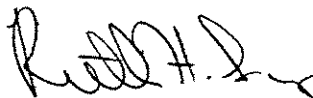
The requestor relies upon Open Records Decision No. 520 (1989), in which names, addresses, and sales tax status of commercial and industrial utility customers were found to be public information under the act. The requestor argues that if the department

refuses to obtain the information or to require TU to produce the requested information "[t]he Comptroller would therefore become the ultimate arbiter of whether the public has access to sales tax records specifically declared to be public." However, Open Records Decision No. 520 (1989) involved a request for tax records kept by a city-owned utility, which is a governmental body subject to the act pursuant to section 552.003 of the Government Code. That opinion is not applicable to this situation.

You indicate that the comptroller does not maintain information as to the identity of customers of particular utilities or information about which businesses are customers of TU. The act does not require a governmental entity to fulfill an open records request by creating or obtaining new information in response to such a request. Open Records Decision Nos. 561 (1990) at 9, 555 (1990) at 1 (act does not require creation or assembly of new information). The comptroller is authorized under section 151.023 of the Tax Code to examine books, records, papers, and equipment during an audit, but we are not aware of any statutory authority for the comptroller to require TU to make its records public and accessible to the requestor.

Since the comptroller does not possess the requested information within the terms of section 552.021(a), it is not required to obtain the information in response to an open records request. We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MAR/rho

Ref.: ID# 28148

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